

Orchestration on a Tight Leash: State Oversight of the WTO

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1. Introduction¹

While orchestration is on the rise with respect to a number of international organizations, the World Trade Organization (WTO) makes little use of orchestration tools. This paper aims to contribute to a better understanding of the obstacles to orchestration and the conditions under which orchestration may emerge in the WTO (and in similar intergovernmental organizations that are reluctant to orchestrate). Drawing on the orchestration theory (Abbott et al. 2014, in this volume), the paper argues that *state oversight* is the most important factor for explaining WTO orchestration. Further, it posits that the degree of oversight is a result of preference constellations among WTO Members (*goal divergence*) and directly affects the likelihood of WTO staffers to actively use orchestration instruments (*orchestrator entrepreneurship*). While other factors might provide incentives to orchestrate (e.g., *intermediary availability*), these are “trumped” by the use of control mechanisms available to WTO Members. Therefore the paper hints at important interaction effects (and potential hierarchies) among the postulated explanatory factors put forward in the orchestration theory

The paper describes the main actors (the orchestrators, intermediaries and targets) in the context of the WTO. It differentiates between the WTO as a collective and individual orchestrator. It further discusses various orchestration techniques across the four main areas of WTO activities and pays special attention to individual orchestration by the WTO Secretariat. This comparison exhibits differences in the degree of orchestration and draws attention to the joint effects of the three main variables: goal divergence, state oversight and entrepreneurship.

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Then, the paper provides an argument as to how these variables interact to account for the scope of orchestration. In order to test the suggested explanatory power of oversight and the conjectured relationships between goal divergence, oversight and entrepreneurship, the paper takes a closer look at the area of trade negotiations where variation can be observed over time. Case study evidence traces the orchestrator-intermediary (O-I) relationship by focusing on how the GATT/WTO by way of “endorsement” interacts with two standard developing organizations (SDOs): the Codex Alimentarius Commission (CODEX) and the International Standardization Organization (ISO). These findings are contrasted with evidence from a recent case on the so-called Friends of Fish initiative.

2. WTO: On orchestrators, targets, and intermediaries

Who is the orchestrator in the case of the WTO? In the context of the multilateral trade organization, it seems important to differentiate between individual orchestration by the organization in a narrow sense (e.g., the WTO Secretariat consisting of the Director-General (DG) and the staff) and collective orchestration by the WTO as a whole (Members States’ representatives and WTO Secretariat).² Collective and individual orchestration attempts not necessarily need to occur in parallel. At times, individual orchestration is observed, while collective orchestration is absent. Collective orchestration is largely driven by Geneva-based diplomats, who influence the day-to-day functioning of the organization (see Elsig 2010, 2011).

What are the WTO’s target groups and what behavior is orchestrated? The main target group for the WTO is states and their domestic trade policy regulation, so orchestration is mainly about “managing states”. The WTO does not directly regulate firms’ activities.³ States’ behavior can range from specific state policies, such as taking safeguard measures against imported goods, and implementing patent protection through national law, to giving preference to some trading partners over others by signing preferential trade agreements. The WTO as an organization offers states incentives to cooperate on trade matters with a view to liberalizing markets. Its main principles are based on equal treatment of foreign and domestic products (upholding the so-called “national treatment” requirement), as well as that of non-

² This conceptual distinction allows for hypotheses related to the relationship between the intergovernmental organization and its member states to be directly tested.

³ Note that firms have no formal standing either in negotiations or in dispute settlement. They are not subject to WTO law.

discrimination against trading partners (known as the most-favoured nation (MFN) clause).⁴ The WTO now has 157 official members. By the end of the Uruguay Round in 1995, there were 112 WTO Members. Since then 45 states have acceded to the WTO. The number of targets has therefore significantly increased. All WTO Members have subscribed to a set of rules that were negotiated or updated in the Uruguay Round. The overall degree of commitments (deepening of market integration) significantly increased and a legalized dispute settlement system based on decentralized sanctioning was set up to assist in the implementation of the negotiated set of new rules and additional obligations (Bernauer et al. 2012).

As to intermediaries, the number of actors augmented significantly over time. In the first couple of decades of the multilateral trading system that was created post World War II, many internationally oriented trading companies developed strong interests in the work of the Geneva-based institution. These exporter interests have increased over time, culminating during the Uruguay Round in the late 1980s where US multinational companies in particular were pivotal in supporting the negotiators (Chorev 2007, Ostry 2001, Woll 2008). The mobilization of import-competing sectors started a bit later; farm associations and labor unions did not discover the GATT (General Agreement on Tariffs and Trade – the forerunner organization of the WTO) until the early 1980s, but they started to become increasingly active in the Uruguay Round (Davis 2003). In the late 1990s, an additional group of private actors emerged. Representatives of civil society organizations (CSOs) advocated particular societal or collective interests, addressing issues ranging from human rights, labor protection, and environmental degradation, to development concerns and gender inequality. While these grass-roots groups vigorously attacked the WTO in the second half of the 1990s (culminating in violent street protests in Seattle), they have gathered expertise in WTO trade law and politics over time and are much more actively and pragmatically engaged today. The number of groups opposing the WTO and therefore unlikely to qualifying for a potential O-I relationship has significantly decreased. Finally, other international organizations qualify as intermediaries. While some relationships are conflict-ridden (e.g., with the United Nations Educational, Scientific and Cultural Organization (UNESCO)) and therefore do not lend themselves to a transformation into an orchestration partnership, other collaborations with intergovernmental organizations such as the International Monetary Fund (IMF) or the World Intellectual Property Organization (WIPO) promise more opportunities for orchestration to

⁴ With the most notable exceptions of allowing bilateral and regional trade agreements, as well as special provisions related to the treatment of least developed countries, that allow for discrimination among WTO Members.

develop (in both directions) (on cooperation, see Dupont and Elsig 2012). This paper will focus empirically how the WTO has in the past explored links with international standards developing organizations (SDOs), either inter-governmental ones (CODEX) or international organizations with a more hybrid character (ISO). In short, the number of intermediaries is significant, but the objectives and incentives for each of the potential intermediaries to collaborate with the orchestrator vary greatly making generalization about “why they allow themselves to be orchestrated” difficult beyond the general assumptions presented in the orchestration framework paper (Abbott et al. 2014, in this volume).

3. Orchestration techniques across functional areas

The WTO has been characterized for many years as an intergovernmental organization that is engaged in direct governance. In particular, the dispute settlement system has been labeled a hard tool allowing the WTO to wield substantial power through a type of hierarchical governance. While this assertion might have been exaggerated, what is overlooked here is that it was not the WTO staffers who would use hierarchical steering; it was instrumentalized in particular by the leading trading powers in the system.⁵ Today, the WTO’s work (and legitimacy) is hampered by lack of progress in negotiations to agree on new market access and on strengthening existing rules. As a consequence, indirect and softer tools of governance, such as orchestration approaches, may become more attractive (and also more widely applied) to “manage states”. In this section, we map orchestration activities across four functional areas of the organization: negotiations, dispute settlement, regime management, and training and technical assistance (see also Thompson and Snidal 2005). In the majority of areas the WTO provides ideational support. Material support is mainly visible in training and technical assistance. In this section, we pay particular attention to the role WTO Secretariat (individual orchestration) and to what degree it has sufficient autonomy to develop potential entrepreneurship. In addition, we focus on two specific factors conceptualized in the orchestration theory (Abbott et al. 2014, in this volume) that affect the magnitude of orchestration: the degree of state oversight and the extent to which WTO Members goals converge or diverge.

In the area of negotiations (the most important activity in the GATT/WTO system), (individual and collective) orchestration, there is generally little orchestration visible. Orchestration is mainly witnessed through attempts to work with other SDOs in form of

⁵ From 1995 to 2010, only 44 contracting parties have used the WTO’s dispute settlement mechanism as a complainant in a total of 427 cases (Horn et al. 2011).

“endorsement” or with other international organizations in form of “coordination” to affect the behavior of WTO Members. Orchestration incentives are explained by a lack of specific expertise or limitation of mandate of the organization as well as the need to cooperate with other intergovernmental organizations (e.g., with the International Monetary Fund). The form of engagement is usually collectively defined in specific Committees chaired by Ambassadors (e.g., Technical Barriers to Trade Committee). Orchestration by the Secretariat is mainly characterized by the DG’s “convening power” and the possibility to grant to intermediaries access to specific information (and to provide behind-the-door counsel) supplied by WTO staff. The Secretariat’s limited “power” is rooted in trade policy expertise, institutional memory, and perceived neutrality. Given the demand for neutrality, developing explicit working relations with particular private actors (and WTO Members) is therefore a risky strategy for the WTO Secretariat; if it is detected, WTO staffers and the DG will face criticism for not representing an impartial position. This possibility of shaming is a strong control tool which can be augmented by other instruments (e.g., budgetary control, exclusion from discussions, etc). In the area of negotiations, WTO Members can take recourse to a multitude of control tools. In particular, the oversight instrument of blocking power in negotiations stands out. A WTO Member can signal and if needed use this individual “oversight” tool legitimized by the consensus principle in which trade deals need universal support. The likelihood of rejecting a negotiation package and using tight oversight is further increased by recourse to the single undertaking approach.⁶ In summary, negotiations over global market integration are characterized by states’ exposure to important distributional effects. Coupled with strong institutional oversight (through sophisticated monitoring arrangements and blockage power), this leads to a low number of examples of Secretariat orchestration.

In the area of dispute settlement, collective and individual orchestration is harder to grasp, not least because of the nature of legal proceedings which are characterized by an environment of limited information and informal processes. When focusing on the various legal agents in the WTO (Legal Division, Appellate Body Secretariat) regular interaction with intermediaries is occurring, albeit in subtle ways. An important intermediary for WTO staff is the group of legal experts and academics outside the WTO which represents a quasi-epistemic community of WTO lawyers. This group supports the development of WTO jurisprudence. Secretariat orchestration comes in the form of organizing conferences and providing venues

⁶ Single undertaking means that WTO Members look for a negotiation package that covers a substantial range of areas, while dismissing calls for issue-specific negotiations that could be concluded separately. All involved parties need to accept the final outcome (see Elsig and Cottier 2011).

for discussion. The most important legal institution in dispute settlement is the Appellate Body (AB) that functions as a final appeal instance in the dispute settlement process. The AB receives support from a specialized Secretariat, but is directly appointed by the WTO Members. Institutional oversight by WTO Members is strong *ex ante* through appointment procedures, but is limited *ex post* due to the “negative consensus” for adoption AB rulings (see Elsig and Pollack 2013). Costs for overriding AB decisions are very high (Bernauer et al. 2012).⁷ In terms of orchestration, an important case stands out. In the late 1990s, the AB attempted to increase the range of arguments related to a case by authorizing to accept unsolicited submissions by private parties (intermediaries).⁸ This move by the AB to allow so-called *amicus curiae* briefs, however, backfired as WTO Members quickly signaled discontent. While Members could not overturn this decision, ever since then, panels and the AB have been reluctant to accept outside submissions (Mavroidis 2001). This episode reflects a failed attempt by one orchestrator (the AB) to potentially enlist future intermediaries that could support certain types of legal reasoning (and broaden the constituency). In sum, while some orchestration activity is visible, it remains limited. State oversight defines clear boundaries for the activities of legal agents within the WTO. While WTO Members agree on the need for implementation and the crucial role of the AB (general support of strong enforcement), they disagree on the results of important cases (case-specific divergence over the goals) with significant distributional effects.⁹

In the area of regime (or implementation-related) management, orchestration is mostly visible in the Trade Policy Review Mechanism (TPRM) process. This activity puts the WTO Secretariat in a privileged position as it periodically reviews Members’ trade policies and writes country-specific reports. For this purpose, WTO staff visit WTO Members’ capitals and interact with different stakeholders while compiling the report. In this process, the WTO Secretariat indirectly endorses certain trade policy measures and criticizes others, engaging in informal “coalitions”. At times, the trade or economic ministry in a country uses the signals from the WTO to pursue domestic reforms (in these cases intermediaries are state actors). They encourage the WTO Secretariat to criticize a certain domestic policy to influence public opinion or to help push back other bureaucratic interests. In addition, private actors can use the report to put issues on the national agenda (agenda-setting). Given the institutional design

⁷ Negative consensus means that WTO Members need consensus to overturn a ruling by the AB. This is unlikely as the winning party (and others positively affected by a panel or AB decision) has little incentive to join consensus to overturn a favourable decision. This explains the theoretically high “costs” of using this *ex post* control instrument.

⁸ On the more general issue of granting court access to individuals, see Tallberg 2014, in this volume.

⁹ The general support is reflected by the low number of proposals in current negotiations to review the dispute settlement system that call for restricting third party adjudication.

of the TPRM process which allows the Secretariat to compile information and inform the Membership, control by WTO Members is limited.¹⁰ In the case of policy review by the WTO Secretariat, we witness general goal convergence among WTO Members as there is an overall interest in increasing transparency through this mechanism, notwithstanding case-by-case disagreement over the amount of shaming and naming.

Finally, training and technical assistance is an activity that has grown significantly in recent years. In this area, WTO officials most directly work with private actors in setting up training activities (but often the borderline between delegation and orchestration is fluid here). The WTO provides funds and resources and works with academics or civil society groups in co-teaching specific training programs.¹¹ Through working with intermediaries, the WTO Secretariat can mitigate criticism voiced by some WTO Members that the Secretariat simply follows an uncritical pro-trade agenda. An example of a special type of orchestration activity in this area is the so-called Chair Programme. The objective of this program is to create a number of WTO Chairs at universities and research institutions in developing countries. The Secretariat is actively involved as orchestrator. Entrepreneurship seems possible as WTO orchestration does not have a direct (or an intermediate) effect on the negotiations or on dispute settlement. The orchestration occurs in the form of provision of funds (it co-finances the start-up, in the form of seed money), assisting with syllabus development, sending of teachers and experts, and most importantly coining the newly established academic positions “WTO Chairs”, therefore rendering additional legitimacy to these academic/educational initiatives. The objectives of the WTO are to assist in developing a better understanding of (and support for) the importance of global rules in trade policy. The program may also serve to promote the overall image of the institution.¹² In this area fewer oversight tools are at disposal for WTO Members (e.g., budget allocation). Members agree over the need to assist least and middle-income developing countries to integrating into the trading system.

The above mapping suggests variation of orchestration activities by the WTO Secretariat (and the Appellate Body) across the functional areas the WTO is engaged in. Table 1 summarizes the magnitude of observed orchestration activity in the four areas and provides a rough assessment of the three factors highlighted (oversight, divergence, entrepreneurship). The table further allows inferring some general tendencies as to causal relationships linking

¹⁰ However, the Members of the Committee where the report is discussed (TPRM Committee) are reluctant to engage directly with the criticism (Elsig 2013).

¹¹ Interestingly, a group of civil society groups was delegated the task by WTO Members of reviewing these activities (see Elsig 2010); see also, Strategic Review of WTO-provided Training and Technical Assistance (TRTA), WT/COMTD/W/152 and WT/COMTD/W/153 (Geneva: WTO).

¹² Interview Senior WTO Official (Research), 23 June 2011; for an overview, see http://www.wto.org/english/tratop_e/devel_e/train_e/chairs_prog_e.htm

these three factors. Most importantly, under conditions of tight oversight and goal divergence, we observe a low degree of orchestration by the WTO Secretariat.

Table 1: Orchestration by the WTO Secretariat

	Trade Negotiations	Dispute Settlement	Regime Management	Training and TA
<i>Orchestrator Entrepreneurship</i>	Low	Low-Middle	Middle	High
<i>Goal Divergence*</i>	High	Middle	Middle-Low	Low
<i>State Oversight</i>	High	Middle	Middle-Low	Low
<i>Scope of organizational orchestration</i>	Little	Little- Moderate	Moderate	Large

Note: * Divergence among WTO Members

4. Orchestration in negotiations: Oversight, goal divergence and entrepreneurship

In this section, we elaborate a more detailed argument how above highlighted factors interact to account for observed outcomes in the most important area of WTO activity: negotiations. We pay special attention to how the “tight control of WTO Members” (*state oversight*) is causally related to the interest constellation among WTO Members (*goal divergence*). Further, we provide a possible explanation how oversight affects the WTO Secretariat’s incentives to take risks (*orchestrator entrepreneurship*). We therefore posit important interaction effects and a hierarchy among the postulated variables for orchestration and specify conditions for collective and individual orchestration to occur. Before we outline the conjectured causal mechanisms, let us focus on the other explanatory factors outlined in the orchestration theory that receive less attention in this study (Abbott et al. 2014, in this volume).

With respect to the WTO, the *intermediary availability* and the *orchestrator capabilities* variables need to be mentioned as these present necessary conditions for

orchestration to be observed.¹³ In their absence, we would not observe orchestration. First, as to the existence of intermediaries with correlated goals and complementary capabilities (*intermediary availability* hypothesis), we witness an increasing number of potential orchestration partners. The trading system is characterized by the existence of many actors with aligned goals and complementary capabilities (e.g., private actors supporting the multilateral trading system, SDOs). While business associations remain the key group of private actors to work with, more non-governmental organizations are becoming supportive and are constructively engaged with the WTO Secretariat. This generates new opportunities.¹⁴ Second, the *orchestrator capabilities* hypothesis suggests that governance actors turn to orchestration if they lack certain capabilities to achieve their goals through other governance modes. Given a trade round that has been deadlocked for years (Elsig and Dupont 2012) this creates incentives to explore orchestration. But also, trade negotiations venture more and more into trade-related areas (e.g., labor, environment, trade facilitation) that affect domestic regulatory systems. In these areas, the WTO and its Members lack capabilities and expertise. Therefore reaching out to other international organizations becomes a necessity. Orchestration tools lend themselves more easily to be applied than other governance approaches.

4.1 Goal Divergence and Oversight

The *state oversight* hypothesis suggests that when member states have weak institutional control mechanisms, international organizations will be more likely to orchestrate. As a consequence (and assuming linearity), this hypothesis posits that the existence of strong control tools will lead to little orchestration. This prediction fits well with the dominant views in the literature on WTO negotiations which provides convincing empirical evidence that WTO Members possess strong oversight mechanisms, which are also used frequently (Blackhurst 2012, Xu and Weller 2004). The need to find consensus in trade negotiations characterized by issue-linkage across a multitude of negotiation topics (single undertaking) equips individual WTO members with a veto power.¹⁵ Therefore the likelihood of collective or individual orchestration decreases. We also observe that WTO Members pay more attention to the Geneva-based organization and use these tight control mechanisms more than

¹³ We do not engage with the *orchestrator focality* hypothesis that is difficult to test in the context of WTO negotiations. The evidence is mixed. While, the WTO negotiation function has not been challenged by other multilateral organizations, the surge of bilateral trade arrangements and plurilateral or sector agreements has diminished focality within the trading system.

¹⁴ Yet, in terms of engaging with business intermediaries, the Director-General of the WTO has on numerous occasions called upon the economic constituencies to support the WTO's negotiation agenda, so far without any notable effects.

¹⁵ A system of qualified voting is envisaged in the GATT/WTO treaties, but decisions are still taken by consensus.

ever (Elsig 2010, 2011). Tight oversight itself is a function of interest distribution among WTO Members (*goal divergence*). We posit that over time increasing goal divergence has translated into increased use of various types of oversight mechanisms and as a consequence we witness less orchestration. What explains the increase of interest divergence among WTO Members? Three causal arguments stand out. The first two are of endogenous and the third one of exogenous nature.

First, increased legalization with the creation of the WTO in 1995 has led to more attention from all actors involved in WTO rule-making. Given a functioning dispute settlement system, Members are aware that rules can be enforced. Perceived salience has increased. As Goldstein and Martin (2000) argue, increased legalization leads to more mobilization of domestic interest groups and the overall appetite for further liberalization decreases. Also as the shadow of cooperation increases (Fearon 1998), we witness tougher negotiations and fewer incentives to make concessions.¹⁶ Therefore any attempt by the collective Membership or the WTO Secretariat to orchestrate is under high scrutiny as preferences that were latent in the past have become more articulated. Second, a shift from negative to positive integration increases the distributional consequences of WTO decisions. Agreeing on general rules and standards that apply to all WTO Members equally is different from negotiating mutually beneficial but differentiated reciprocal tariff concessions that characterized the GATT era. Put differently, we have moved from a prisoner's dilemma game to a battle of the sexes game with important distributional consequences (Krasner 1991). The latter one leads to more contentious decisions and makes preference divergence more visible. Third, in terms of exogenous changes, we have witnessed an underlying shift in the global economic power structure. During the Uruguay Round negotiations, the GATT system was dominated by the US and the EU. When their overall positions converged over time, this led to agreement on hard and direct tools of governance. Today, the leading role of the US and the EU has been challenged by a group of emerging economies. We have moved from a bipolar to a multipolar trade world reflected by small group negotiations gathering up to seven key WTO Members.¹⁷ This shift comes with increasing preference divergence.

As a result of above factors, the WTO negotiations suffer from an increasing level of interest divergence. Growing concerns about distributional consequences limit – under conditions of strict oversight – orchestration attempts. Following this causal argument, we

¹⁶ Since 2001 many WTO documents include a disclaimer stating that the content is without prejudice to the Members' rights and obligations, which de facto means that they cannot be used during dispute resolution.

¹⁷ Following actors have been frequently involved in small group negotiations: Brazil, Canada, China, European Union, India, Japan, United States.

warrant caution as to whether the bivariate goal divergence hypothesis holds in the context of the WTO. Largely following Principal-Agent analysis (Weingast and Moran 1983), the OIT model suggests that if there is divergence of goals between member states and the intergovernmental organization, then the likelihood of orchestration increases. Increasing divergence of trade interests among WTO Members might free up the opportunities to engage in some form of agency behavior not preferred by principals (e.g., agency slack). However, contrary to the hypothesis that goal divergence leads to more orchestration, in the context of the WTO we expect less orchestration. We posit that the interaction effect between oversight and goal divergence to account for this result.

4.2 ...and Entrepreneurship

Following the alleged interaction effect that increased goal divergence under conditions of strict oversight leads to little orchestration (both collective and Secretariat orchestration), this section focuses in more details on the relationship between oversight, entrepreneurship and orchestration by the Secretariat. In this respect, the *orchestrator entrepreneurship* hypothesis posits that actors are more likely to engage in orchestration when their organizational structure and culture encourage policy entrepreneurship. Control and vigilance by WTO Members, as described above, is reflected in the WTO organizational structure.¹⁸ There is ample anecdotal evidence that suggests that both the current DG Pascal Lamy (and many WTO staffers) are capable of entrepreneurial behavior. Yet, while the WTO Secretariat may have many officials who are well trained, skilled and creative, the “member-driven” character of the organization directly affects their “willingness to take risks” (Abbott et al 2014, in this volume). We have seen above that if members fundamentally disagree on objective, then tight control instruments are used and this determines the limited entrepreneurship. Put differently, with increasing divergence of interests, we should also witness that the mix of oversight tools used by WTO Members changes. We expect for instance that WTO Members will rely less on fire-alarm control tools and pay more attention towards police-patrol instruments. Policy-patrol gains in prominence as the number and size of WTO delegations increase (Elsig 2011). The presence of diplomats and their active involvement in the negotiations limits the orchestration spectrum for collective attempts by the Membership or by the Secretariat.

In the following, we focus on three cases of orchestration in trade negotiations. This allows tracing the causal mechanisms outlined above accounting for the variation and amount of orchestration.

¹⁸ For a discussion on how tight oversight affects orchestration in the context of the ILO, see Baccaro 2014, in this volume.

5. Empirical Discussion

In the following section, we discuss three cases of orchestration (or lack thereof). The first two cases focus on two of the best known episodes of orchestration related to standard-setting during the Uruguay Round negotiations. We focus on interest constellation, oversight and pay particular emphasis on the role of the Secretariat. Tracing the cooperation between GATT/WTO and SDOs over time allows us to gauge the effect of the interest constellation qua oversight on orchestration. While both the Membership and the Secretariat were able to contribute to orchestration during the 1990s, similar “endorsement” is constrained today due to increasing divergence of preferences and the vigilance of WTO Members reflected in the application of tight oversight mechanism (in particular its sophisticated police-patrol monitoring apparatus). In the case of ISO, the decline of orchestration is largely a result of a shift in the position of the US and thus goal divergence with other key actors, such as the EU. This went hand in hand with more active monitoring.

The third case is drawn from a recent example where we witness only cautious attempts by the Membership or the WTO Secretariat to engage in orchestration. The evidence presented shows again how interest divergence under condition of tight oversight may explain why there is less orchestration. In relation to the WTO Secretariat, we witness less risk-taking over time (and decrease of entrepreneurship).

5.1 *Orchestrating Codex and ISO*

In the following, we briefly focus on the relationship between the WTO and two of the most important SDOs in the context of international trade: CODEX and ISO. We discuss the original decision by the actors in the GATT to engage in endorsement-type orchestration during the Uruguay Round negotiations and trace how cooperation through orchestration has evolved over time.

In the 1980s, many leading GATT Members and the GATT Secretariat were in favor of limiting obstacles to trade based on the unilateral application of national product standards. This was a major concern during the Uruguay Round, as technical regulations were often used as a disguised measure for protectionism. This led to increasing calls for harmonization or mutual acceptance of product-related standards. As the GATT itself lacked the capacity to develop internationally-accepted product and process standards, it was reaching out to international SDOs. In short, it created a linkage to important SDOs by embracing their

recommendations on standards. This “endorsement” took the form of urging states to use these standards in their national regulation (Büthe 2008). In this respect the agreement on technical barriers to trade (TBT Agreement) states in its Art. 2.4 that “where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulation.” Similarly, Art. 2.6 of the TBT Agreement emphasizes the objective of moving towards the harmonization of technical regulations and encourages WTO Members to “play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.” Therefore, there was general agreement on the need to reach out to these expert bodies. However, while it was obvious that the focal international body for standardization work in this area was the ISO, Members abstained from explicitly listing ISO or any other organization. ISO was perceived by many developing countries as an organization representing the interests of companies from developed countries, whereas the US had some concerns related to the European dominance within that organization.¹⁹ ISO, for its part, worked towards an explicit endorsement, not least because it had considerable financial incentives to become the universally accepted SDO, as it sells its standards to the industry.²⁰ To sum up, the GATT endorsed the work of SDOs, however it did not explicitly attribute to ISO the dominant position among potential intermediaries. This outcome is explained by moderate goal divergence (some opposition of developing countries and the reluctance of the US with respect to ISO).²¹ At the same time, collective agreement (among key players) on the general need to tackle unnecessary standard-related trade barriers translated into less state oversight (no need for police-patrol) and clear encouragement to endorse the work of SDOs in this field.

A similar story can be told about the linkage that was created in the Uruguay Round negotiations with SDOs in the fields of food safety, animal health and plant health. In the area of food safety, governments that pushed the export interests of their agricultural producers (e.g., US, Canada, Australia, Argentina), were keen to restrict arbitrary application of national food safety regulations. They were pushing for a “binding agreement on SPS measures” (Büthe 2009:10). Similarly to the discussions on product standards, it became common understanding among WTO negotiators that the multilateral trade platform was not the optimal forum in which to develop standards. So, there was strong support to consider relying

¹⁹ Interview Senior WTO Official (TBT), 23 April 2012.

²⁰ Interview Senior WTO Official (TBT), 23 April 2012.

²¹ The US supported the linkage, however, it was less keen to endorse ISO as an organization.

on international standards developed elsewhere. Art. 3.1 of the SPS Agreement reads: “To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist (...).”

While the great majority favored more reliance on international standards, one key difference to the SDOs in relation to product standards was that the GATT worked towards explicit “endorsement” of selected SDOs in the fields of food safety, animal health and plant health. The final agreement on sanitary and phytosanitary measures (SPS Agreement) lists CODEX (with respect to food safety), the International Office of Epizootics (with respect to animal health), and the International Plant Protection Convention (with respect to plant health standards).²² It is noteworthy that in the area of food safety, different organizations were actively competing for “endorsement”. Multiple organizations were keen to be explicitly mentioned as SDOs because they expected to gain in importance and in prestige as an international SDO. As far as CODEX is concerned, representatives of one of CODEX’s parent organizations (the Food and Agriculture Organization of the United Nations (FAO)) frequently interacted with the negotiation group “praising the unique scientific expertise of Codex committees” and successfully “built “a constituency among developing countries” (Büthe 2009:11).²³ As Büthe writes, the challenge of privileging certain organizations over others was the “source of discussion and contention for a long time, since the consequences of the other provisions hinged to a large extent on whose standards would be recognized as ‘international standards’.” He continues, “The EU in particular sought to get the UN/ECE and the OECD written into the Agreement.”²⁴ “The other members of the inner core group were largely indifferent vis-à-vis UN/ECE and OECD, but the official recognition of these two standard setters in the SPS Agreement was strongly opposed by developing countries” (Büthe 2009:10). However, the US, the EU and key developing countries supported CODEX.²⁵ The result of the GATT’s endorsement of CODEX was on the one hand that it became more

²² Art. 3.4 SPS Agreement: “Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.”

²³ Codex is a joint organization of FAO and the World Health Organization (WHO).

²⁴ UN/ECE (Economic Commission for Europe) develops standards in a more regional context, the work of OECD represents highly industrialized states.

²⁵ Some evidence suggests that the EU negotiator was not very familiar with how CODEX worked, however, the “U.S. negotiators had a very good understanding of how Codex worked, thanks to the presence of multiple experts with experience in Codex on the U.S. domestic ‘inter-agency’ committee charged with developing the U.S. negotiating position. On that basis, the U.S. supported Codex strategically” (Büthe 2009:11).

prominent and accepted as the key focal organization for standard-setting in the food safety area, while, on the other hand, politicization increased significantly, impacting on the technical work (Silverglade 2000, Smythe 2009, Dupont and Elsig 2012).²⁶ This episode is a story of full endorsement explained by goal convergence among the two key trading powers in the 1980s. Given convergence (also between most GATT Members and the GATT Secretariat), we observe no specific attempt to apply tight control mechanisms such as monitoring instruments or the threat of using veto power.

During negotiations to craft the TBT and the SPS Agreements, the key actors were the Members of the GATT. However, interview evidence suggests that the Secretariat supported the Member States in approaching the SDOs and in exploring potential cooperation.²⁷ There was some room for policy entrepreneurship in particular in relation to the SPS negotiations. A GATT staff member was even informally chairing parts of the negotiations, putting the Secretariat in a more prominent position to orchestrate vis-à-vis Codex.²⁸ The Secretariat was able to push forward the issue. The Secretariat was also supported by GATT Members (albeit with the exception of a number of developing countries and the US) to spearhead an explicit linkage with ISO. An important condition for this type of joint GATT/WTO orchestration (by leading Members and the Secretariat) was the existence of only moderate opposition.

How have the relations between the WTO Secretariat and these SDOs developed over time? Has the WTO Secretariat alone or in consultation with specialized Committees explored additional orchestration? Clearly, what we observe today are more cautious types of “coordination” in terms of orchestration with much less visible effects. Neither the WTO Secretariat nor competent Committees chaired by Ambassadors encourage SDOs to design new standards to address new or existing obstacles to trade. In the case of ISO, the Secretariat has become even more cautious over time about supporting the work of ISO.²⁹ In the first years after the creation of the WTO in 1995, the Members of the competent implementation-related Committees (e.g. TBT and SPS), after some reflection and discussions, granted observer status to ISO, Codex and other SDOs.³⁰ There was consensus among WTO Members that this could allow for an institutionalized exchange of information. In itself it did not constitute a significant form of orchestration. Over time, we find some types of orchestration at a very low level (similar to coordination). For instance, by 2002 the TBT-Committee with

²⁶ Bütte writes: “At the launch of the Uruguay Round negotiations in 1986, Codex had a 23-year history of rather modest achievements and faced an uncertain future; some characterized it as ‘moribund’” (Bütte 2009:2).

²⁷ Interview Senior WTO Official (SPS), 23 April 2012.

²⁸ Interview Senior WTO Official (SPS), 23 April 2012.

²⁹ Interview with Director from Central ISO Secretariat, 11 May 2012.

³⁰ For a list, see G/TBT/GEN/2/Rev.2 (28 June 2010). For a general overview, see http://www.wto.org/english/thewto_e/igo_obs_e.htm

the help of the Secretariat, had established a set of guiding principles for the elaboration of standards that called for more transparency and participation in the work of SDOs.³¹ This was a reaction to criticism that some WTO Members were excluded from the processes in international standard-setting. The decision stated: “Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade.” This set of principles did not a priori privilege ISO over others, but ISO quickly made it known that it fully accepted these principles and was already following them.³²

What is noteworthy is that ISO has not remained on the sidelines and has actively lobbied to be explicitly endorsed by the WTO after all. However, compared to the Uruguay Round negotiations, the division among Members is now even more pronounced in relation to endorsement of ISO. In particular, the US, echoing early concerns, blocks attempts to allow the ISO such a prominent role. The US is in favor of a more competitive system, where companies’ product inventions drive standard-setting and in which national private organizations manage a quasi bottom-up approach. For the US, ISO is largely a top-down, partially public (and not a private), standard-setting organization, dominated by EU Members. Not surprisingly, US-based national SDOs, such as the American Society for Testing and Materials (ASTM International) (supported by the US) have tried to get themselves considered together with international SDOs in the context of the TBT Agreement and its implementation.³³ China has so far not taken an active stance, and developing countries are mostly interested in financial resources to be able to participate in the work of international SDOs.³⁴ In particular, the transatlantic divergence of interests makes it difficult for the WTO Secretariat to engage in more tangible forms of orchestration. Lack of consensus translates into more policy patrol and hinders *orchestration entrepreneurship*. Therefore, we observe few activities by the Secretariat that could be defined as orchestration. Some informal exchanges exist in the area of technical assistance, which is less politicized. The Secretariat occasionally invites experts from ISO to participate in WTO teaching programs.³⁵ But even

³¹ “Decision of the committee on principles for the development of international standards, guides and recommendations with relation to articles 2, 5 and annex 3 of the agreement” (see G/TBT/1/Rev.8, 23 May 2002).

³² Interview with Director from Central ISO Secretariat, 11 May 2012.

³³ See also Büthe (2010:43, footnote 156).

³⁴ Interview Senior WTO Official (TBT), 23 April 2012; interview with Director from Central ISO Secretariat, 11 May 2012.

³⁵ Interview Senior WTO Official (TBT), 23 April 2012.

this type of light orchestration has become more difficult. The Secretariat stopped inviting officials from the ISO Secretariat and instead started to invite officials from national SDOs (part of the ISO family), so ISO was not explicitly mentioned in the program, which could have drawn criticism from WTO Members.³⁶

In summary, the Secretariat has been in no position to publicly support ISO as long as important WTO Members such as the US use their powers of oversight. It was the ISO itself that was active as an intermediary. In the current negotiations, ISO continues to encourage WTO Members to embrace it more prominently as the focal SDO in the WTO treaties. Finally, ISO has been concerned about the way the dispute settlement bodies of the WTO (panels and the Appellate Body) suggest more flexibility to use non ISO-based standards, abstaining from filling in the treaty gaps and giving exclusive preference to ISO as a focal SDO.³⁷ We therefore witness an engaged intermediary which is actively reaching out to be “orchestrated”.

In terms of WTO-CODEX relations, we observe little orchestration mainly because there are currently no negotiations in the realm of the SPS Agreement. Both sides (CODEX and WTO) engage in collaboration and exchange of information. The WTO Secretariat is invited to attend the biannual CODEX Commission whereas CODEX has observer status both at the SPS- and the TBT-Committee and makes contributions alongside other SDOs.³⁸ Yet, overall both the WTO staffers and WTO Committees abstain from making direct suggestions for the work of CODEX. Important WTO Members continue to be vigilant and use their oversight to prevent orchestration activities by the Secretariat.

5.2 *Orchestration and the “friends of fish”*

We now turn to a negotiation issue that came up in the current Doha Round. We discuss in more detail how division over goals keeps tight state oversight, which in turn affects the behavior of the WTO staff towards experimenting with orchestration tools. In this brief case study, we focus on the attempts to address the thorny issue of fishery subsidies and the role played by the WTO Secretariat as potential orchestrator.

Since the beginning of the Doha Round a group of countries known as the “Friends of Fish” (FoFs) have strongly advocated the phasing out of subsidies in the fishery sector.³⁹

³⁶ Interview with Director from Central ISO Secretariat, 11 May 2012.

³⁷ Interview Senior WTO Official (TBT), 23 April 2012.

³⁸ Interview Senior WTO Official (SPS), 23 April 2012.

³⁹ Currently, members of this group include Argentina, Australia, Chile, Colombia, Ecuador, Iceland, New Zealand, Norway, Pakistan, Peru, and the US; http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf

Another group called the “Friends of Fishermen” have resisted the attempt to limit states’ capacities to subsidize their fisheries.⁴⁰ It has been a divisive topic although more Members are sympathetic to the FoFs position than to the Friends of Fishermen. The WTO Secretariat supports this initiative, but has to be very cautious. The Secretariat realizes that this is an important part of a Doha package; it would be a hard blow for the legitimacy of the system to continue to allow this type of subsidies and would lead to criticism by stakeholders with strong preferences related to environmental issues. While negotiators were active on this topic and the Uruguayan Chair of the so-called Rules negotiations produced a chair’s text in 2007, no progress has been achieved in the past 5 years.

In the negotiations, the main task of the Secretariat is to support the Chair of the negotiation group.⁴¹ The Secretariat works closely with the Ambassador to attempt to guide the WTO Members towards finding consensus. Yet, this activity does not fall under the definition of “orchestration”. One of the issues that divided the Members was the question whether and how to involve another international organization (the FAO) for the monitoring of countries’ fishery subsidies (and overall fishery management systems). Similar to the discussions that occurred during the Uruguay Round negotiations with a view to endorsing international SDOs through the TBT and the SPS Agreements, the question arose whether FAO could support the WTO in an area where the WTO clearly lacked expertise. This time, however, WTO Members were more divided than in the past on the necessity to endorse the (future) work of another specialized international organization. While some WTO Members wanted the WTO to keep the control on monitoring and enforcement, others were more prepared to engage in orchestration with the FAO. In the end, the Chair suggested some sort of peer-review (without any effects on WTO dispute settlement), which would take place in a meeting among FAO Members (not the FAO staff) to allow control by the Member States to continue.⁴² On the intermediary side, the FAO Secretariat showed willingness to cooperate (to be orchestrated), but this time was less forthcoming than the CODEX Secretariat was 20 years ago.⁴³

The FAO was, however, not the only potential intermediary in this case. Two NGOs lobbying in this area (OCEANA and the World Wildlife Fund (WWF)) “offered” their

⁴⁰ The key advocates are Japan, the Republic of Korea and Chinese Taipei.

⁴¹ On Secretariat–Chair relations, see Odell 2005, Tallberg 2010, Elsig 2011. In this round, negotiation committees are all chaired by WTO Members’ representatives. The only exception is the coordinating Trade Negotiation Committee (TNC), which is chaired by the DG.

⁴² Interview senior WTO official (Rules Division), 24 April 2012, interview Member of DG Cabinet, 16 September 2011.

⁴³ Some evidence suggests that the FAO Secretariat was wary of politicization and therefore adopted a low profile, interview senior WTO official (Rules Division), 24 April 2012, interview Member of DG Cabinet, 16 September 2011.

particular services as intermediaries in order to manage states more directly and affecting the negotiation position of reluctant WTO Members. While both groups had the same objectives, they pursued different approaches towards lobbying the Members. WWF was more active through public campaigns, while OCEANA, a US-based conservation organization, interacted more directly with WTO Members and provided opportunities for technical assistance in relation to fish management programs. OCEANA also hired a former USTR to coordinate its campaign in the US and in Geneva. The Secretariat was generally supportive of the work of both groups, in particular OCEANA, but had to be very cautious in order not to offend the Friends of Fisherman Group. DG Pascal Lamy welcomed OCEANA's involvement. However, he could not publicly endorse their cause. He was criticized for posing for a photograph with an activist from the conservation organization dressed up as a big fish.⁴⁴ What does "below-the-radar" type of orchestration by the Secretariat look like in this case? The Secretariat provides selected negotiation-related information to these two NGOs; however, the Secretariat treads a thin line because Members that are not part of the FoFs initiative scrutinize every step taken by the Secretariat carefully. Therefore, it could not use any of the orchestration tools in an active way. It could not convene meetings, coordinate efforts, or endorse any of the activities, nor could it provide material assistance or the like. At times, the WTO Secretariat helped book a room on the WTO premises for meetings involving OCEANA (but Members also did so), yet they stayed on the sidelines during these meetings. The Secretariat was primarily important for the intermediaries as a provider of unfiltered information. OCEANA was trying to orchestrate the Secretariat, but quickly realized the limits of the Secretariat.⁴⁵ Overall, some of the progress observed in the negotiations towards finding common positions among Members (illustrated by the fact that the negotiation group produced at least a Chair's Text),⁴⁶ is not a result of the Secretariat's influence, but is based on the initiative of the FoFs Group, the public affairs campaigns and behind-the-scene lobbying of OCEANA and WWF (the intermediaries), and the role of the Uruguayan Ambassador who chaired the negotiation group. This case illustrates how interest divergence among WTO Members (*Goal Divergence*) leads to an increased use of *State Oversight* through policy-patrol type control (by Geneva-based WTO Ambassadors and their staff). This in turn makes WTO officials reluctant to exhibit policy entrepreneurship by way of orchestration.

⁴⁴ The actor and founder of OCEANA, Ted Danson, visited the WTO headquarters and posed with DG Lamy and OCEANA mascot "Finley the Fish", 7 November 2007.

⁴⁵ Interview with representative of OCEANA, 22 September 2011.

⁴⁶ Most of the other negotiation groups did not manage to come up with a Chair's Text.

6. Conclusion

This paper has engaged with the orchestration theory and has discussed and tested a number of hypotheses put forward in the framework paper with respect to the WTO (Abbott et al. 2012, in this volume). From the above, three issues merit special attention.

First, the paper contributes to the orchestration theory, by advancing the proposition that some factors are more important than others in explaining variation in orchestration in the GATT/WTO system and the peculiarly low levels of orchestration in the realm of trade negotiations. The *state oversight* hypothesis has received overwhelming support in this respect. In addition, the empirical evidence suggests important interaction effects, most visible between *goal divergence* and *state oversight*. As preferences among WTO Members diverge, Members increase monitoring which makes orchestration less likely. The study has also shown how increasing oversight affects the incentives for WTO staffers to engage in entrepreneurial risk-taking referring to important causal effects of increased control. In the context of the WTO, where results need consensual support from the Membership, the Secretariat finds it difficult to orchestrate and is constantly watched by some Members to see that it does not take sides. Put differently, the Secretariat is only able to orchestrate if divisions of preferences among Members are moderate (or low) and when they are given informal or formal mandates to do so (which occurs less and less). Therefore, analyzing bivariate relationships without controlling for interaction effects would prevent us from understanding that some factors are more important (to the level of a variable that acts as a necessary condition) than others.

Second, the study shows that intermediaries often actively lobby for endorsement, as the cases of ISO and CODEX illustrate. Or, they try to instrumentalize the staff of the international organization as intermediary and become orchestrator if the organization lacks the capacity, as the FoF initiative suggests. Further work on the orchestration theory could analyze more systematically the incentives of intermediaries to engage with the orchestrator or the target groups and study these dynamic relationships in greater detail. Orchestrators may shop for the perfect intermediaries, but also intermediaries may choose orchestrators from a range of actors. Why do they decide to work with the orchestrator instead of directly lobbying the targets?

Third, above cases have shown that orchestration is possible when there is convergence of interests among key WTO Members. In particular, organizations that are

designed, or have developed over time, to operate as member-driven organizations (with little agency for staffers), depend on a collective push for orchestration. Without agreement among the Membership as collective principal, orchestration remains limited in its scope and reach. Given important divisions among Members as a result of trade policy's distributional effects (and the emergence of more powerful trade actors), we see few combined efforts to orchestrate. Given that the organization is characterized by deadlock in its most important function – negotiating market liberalization and creating global rules for trading activities – it remains to be seen when *state oversight* may eventually weaken (given a different assessment of distributional consequences) and new opportunities for orchestration arise again.

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